

No. 11662.

IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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PHILLIP HIMMELFARB,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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APPELLANT'S REPLY BRIEF.

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WILLIAM KATZ,  
415 Chester Williams Building, Los Angeles 13,  
*Attorney for Appellant, Phillip Himmelfarb.*

FILED

JUL 21 1948

PAUL P. O'BRIEN,



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It is a basic and cardinal principle of our democracy that the government, its subdivisions and agencies shall at all times and in all manner deal fairly and justly with its citizens. Consequently, it is both shocking and disturbing to find the government falling far short of the fundamental principle of fairness and honesty in the presentation of its case against a private citizen.

Particularly abhorrent is such lapse when made or done by an agency of the government charged with the responsibility of administering or enforcing our lofty principles of law and justice.

The United States Attorney has presented to this court in the "Statement of Facts" set forth in Appellee's Brief a wholly distorted, incorrect, equivocal and deceptive state-

ment of the evidence adduced in this case against appellant Phillip Himmelfarb.<sup>1</sup>

Moreover, the government has coupled with such "Statement of Facts" the wholly unwarranted and unsupportable accusation (R. B.<sup>2</sup> p. 4, n. 4) that appellant (as one of the "appellants") has presented an inaccurate, partial statement of facts in his brief, prepared in disregard of the controlling rule on appeal and loaded the record with pages of matter in no way bearing on the appeal.<sup>3</sup>

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<sup>1</sup>Except where otherwise indicated, the term "appellant" throughout this brief, as in the Opening Brief, refers to PHILLIP HIMMELFARB only, and shall, as in said Opening Brief and throughout the trial of this case in the Court below, concern himself solely and entirely with the case against him and not with the case against his co-defendant, Sam Ormont.

<sup>2</sup>Throughout this brief, the letters "R. B." will refer to appellee's reply brief, and "O. B." to appellant's opening brief, and all matters appearing in parenthesis and italics throughout this Brief are appellant's, unless otherwise indicated.

<sup>3</sup>Appellant diligently sought to be, and is certain that he was most meticulous in fully, fairly and accurately setting forth in the statement of facts in his Opening Brief all of the pertinent evidence offered and received against and for him in the light most favorable to the government. A careful reading of the record herein establishes that the charge by the government that appellant based his statement of facts on conflicting testimony or selected excerpts favorable to himself, or matters going to the credibility of witnesses, or disregarded the rule on appeal that evidence is viewed in the light most favorable to the government, in so far as such charges are directed against this appellant, are as completely unfounded as they are lacking in good faith. This appellant has not placed in the record before this court one single solitary page of matter which occurred in any case brought against him under the Emergency Price Control Act, or in any other case under any other Act. The author of appellee's brief exhibited so little regard for accuracy respecting, and the importance of the record that he did not deem it necessary to distinguish the record herein against appellant from the record herein against SAM ORMONT, and to disclose to the court that of the "150 pages of matters" referred to by him, 6 pages [Tr. pp. 80-86] thereof set forth a *motion made by the government in this case* to consolidate the trial thereof with

Such conduct on the part of the United States Attorney can neither be justified nor condoned. Because the charge herein made by appellant is a grave one and should not, and unquestionably will not, go unnoticed by this court, appellant intends to devote a major part of this brief to establish the truth thereof.

Counsel for the government are fully aware that the record in this case cannot and does not support the verdict and judgment rendered and entered against appellant. Instead of being frank and forthright with this court, with themselves, and the appellant, and so stating, or merely setting forth the actual facts of this case to let such facts speak for themselves to this court, the government has sought to present to this court on appeal a stronger case than it made in the court below, and actually has to present to this court.

One stratagem by which counsel for the government seek to accomplish this base purpose and the manner by which they shirk their bounden duty to fairly state to this

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another action then pending, points and authorities in support thereof and the order thereon; 25 pages thereof [Tr. pp. 237-262] are *proceedings of this case* in the court below, and that the remainder thereof pertains to a motion and evidence and argument in support thereof, by SAM ORMONT for immunity and to bar further prosecution of him [Tr. pp. 141-203; 214-236; 262-301], none of which matters, with the exception of the 25 pages of proceedings in this case in the court below [Tr. pp. 237-262], were designated as a part of or caused to be included in the record of this case by appellant, as is established by the very transcript references cited by appellee, and the designation of record filed by appellant in this court. That part of the Designation of Record on Appeal, designating the portion of the reporter's transcript to be included in the record herein, which comprises all of the testimony offered and received against and for appellant is reproduced in Appendix A hereof in order that this court may, by reference thereto, more readily delineate from the entire record herein the record of appellant.



court the facts adduced in this case against the respective appellants is disclosed in footnote 7 on page 6 of the government's brief.

This footnote was shrewdly cast in such language as to avoid affirmatively stating falsely in the first sentence thereof that most of the evidence in the record was admitted against both appellants. By failing, however, to truthfully disclose to this court that most of the evidence in the record, including such thereof as related to the joint operations of Ormont and appellant, was not admitted against appellant at all but received only as against Ormont, appellee infers that most of the evidence in the record was admitted against both Ormont and appellant.

The second sentence of the aforequoted footnote is, of course, intended to make inevitable such erroneous inference on the part of this court by implying that in addition to the evidence in the record against both Ormont and appellant, there was evidence admitted against each, which the court was careful to limit to the defendant to whom it applied, *i. e.*, against whom it was admitted.

In the third sentence of the aforequoted footnote, counsel for the government imply that appellee's statement of facts first sets forth the evidence in the record admitted against both defendants, and then "point(s) out specifically what facts are applicable to each of the appellants separately." This, of course, is intended to bolster the false implication that the words "what the facts in that respect show on an over-all basis" is synonymous with the words "what the facts in that respect show against both appellant and Sam Ormont." The government fails, however, at any point in its brief to point out what evidence in the record was admitted solely against appellant and what



evidence in the record was admitted solely against Sam Ormont, and this notwithstanding the fact that the most rudimentary principles of fairness and justice required the government to present separate statements of the facts of the respective cases adduced against the respective defendants.

The first paragraph of the "Facts" upon which the government relies (R. B. p. 5)<sup>4</sup> in so far as it may state facts and be supported by the record herein relates to evidence admitted as against Sam Ormont only [Tr. pp. 339-345, incl.]. There is no evidence in the record herein against appellant to support said paragraph.

The first sentence of the second paragraph of appellee's statement (R. B. p. 5) is supported by the record against appellant and the entire substance thereof was included in appellant's statement of facts (O. B. p. 5).

The government states as a fact in the second sentence of its second paragraph that "Himmelfarb's true gross income for that year (1944) was \$18,252.65, his net income for income tax purposes was \$17,752.65, and the correct tax due was \$5,843.91, as shown below." Such statement is wholly unsupported by the record, and appellee, because of an utter impossibility so to do, gives no citation to the transcript or reference to any exhibit in support thereof. It should be noted by this court that such statement is not made as a contention or argument, but contrariwise, is set forth as a fact established by the record.

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<sup>4</sup>Each paragraph of appellee's statement of facts herein discussed will be designated by consecutive number, commencing with the first paragraph on page 5, as paragraph No. 1.

The first sentence of the third paragraph of appellee's statement (R. B. p. 5), exclusive of the phrase "by requesting permission to examine appellants' books and records," is supported by the record against appellant, and the entire substance thereof, less the indicated phrase, was included in appellant's statement of facts (O. B. pp. 8-9).

The second sentence of the third paragraph is supported by the record against appellant in so far as it states that on May 24, 1945, a partnership return of income, disclosing joint income for appellant and Sam Ormont for the period May 1, 1944 to April 30, 1945, in the sum of \$71,-388.84, and that fact was plainly stated in appellant's statement of facts (O. B. pp. 5 and 6).

The adjectives describing the income referred to in such third paragraph as "additional, previously unreported," is a wholly gratuitous contribution to the record by counsel for the government.

The record is wholly barren of any evidence against appellant to support the first and last sentence of the fourth paragraph of appellee's "statement of facts," and any evidence which may be in the transcript respecting the matters stated in those sentences was admitted as against Sam Ormont only. There is some evidence favorable to the government tending to establish the second sentence of the fourth paragraph, and the evidence in that regard was plainly set forth by appellant in his statement of facts (O. B. pp. 9-10).

At this point in appellee's "statement of facts" (R. B. p. 6), and following the paragraph designated by appellant as Paragraph 4, appellee by way of a footnote sets forth "for the convenience of the court" a purported "table" allegedly

“prepared” “from the evidence in the case.” In such table the government lists the amounts shown in appellant’s 1944 return as his gross income, allowable deductions, net income and income tax, and in juxtaposition thereto the purported “true figures” therefor for said year. It will be observed by this court that the statement “true figures” and the purported amounts listed thereunder are stated as a fact established by the record and not as a contention advanced or argument made. Again, no citation to the transcript or to any exhibit is given in support of such “table,” and the purported “true figures” set forth therein by appellee. Both such figures and the designation are wholly unsupported by any evidence in the record.

The fifth, sixth and seventh paragraphs of appellee’s statement (R. B. p. 7) will be considered together for the reason that the government cites pages 427-435, inclusive, of the transcript in support of the “facts” recited in said paragraphs.<sup>5</sup>

Appellant respectfully asks this court where in the cited portion of the record there is any evidence of or reference to:

- (a) “*income from sales of meat*”;
- (b) “*sales of meat made by each of appellants within the ceiling prices set by the Office of Price Administration during the period of price control on meat*”;

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<sup>5</sup>Appellant has reproduced said pages of the transcript in Appendix B hereof so that this court may more readily see that not only are the said paragraphs wholly unsupported by the record against appellant, but that the “facts” as set forth by counsel for the government in its brief bears no semblance of similarity to the record.

- (c) income from or sales of meat which *“was usually reported on invoices and recorded on these books”*;
- (d) *“figures on the 1944 income tax returns upon which this case is based, were based by appellants upon these ceiling, recorded prices”*;
- (e) *“in addition to that income each of the appellants received as income from the sale of meat certain ‘bonus’ or ‘overceiling’ payments which consisted of additional cash sums of money, paid by appellants regular customers in connection with their purchases of meat from the Acme Meat Co., in addition to the legal ceiling prices reported on appellants’ books”*;
- (f) *“these additional ‘bonus’ payments were not recorded on appellants’ books”*;
- (g) *“nor were such sums reported by either appellant as part of his income for income tax purposes for the calendar year 1944 upon his income tax returns for 1944.”*<sup>6</sup>

Appellant further respectfully requests this court to review that portion of appellant’s statement of facts (O. B. p. 6) narrating the evidence contained in pages 428-435,

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<sup>6</sup>The government cites in support of this statement Government’s Exhibits 50 and 51. There are no Exhibits 50 or 51. There are Government’s Exhibits 50-A, 50-B and 50-D, which were received in evidence against appellant only, and 51 A, B and D received against SAM ORMONT only. Exhibits 50-A and 50-B are identical statements of net worth of appellant as of April 30, 1945, and Exhibit 50-D is a letter, dated July 30, 1945, signed by appellant and addressed to Donald Bircher, Special Agent of the Bureau of Internal Revenue, advising him, in substance, that the total amount received by appellant from the joint venture was \$35,694.42; that a cumulative record only was kept of the amounts received, and that the profits were distributed at irregular intervals.

inclusive, of the transcript, both for the purpose of comparing same with appellant's statement of facts based thereon and to determine the validity of the derogatory criticism thereof made by government counsel.

Any evidence adduced in support of Paragraph 8 of appellee's statement in so far as said paragraph may set forth facts supported by the record herein was admitted as against Sam Ormont only. There is no evidence in support of said statement in the record herein against appellant.<sup>7</sup>

Although without bearing on the facts of the case of appellant herein because it pertains to evidence admitted against Sam Ormont only, it may be well, as a striking illustration of the "fairness" of the government's brief to call the attention of this court to the fact that the invoices referred to by the government as "not entered on its books, nor was that income included as part of the gross or net income for 1944 reported by appellants," were invoices for the year 1942 [Tr. pp. 398-401; 416-417].

There is no evidence whatever in the record against appellant herein of "additional unreported 'bonus receipts,'" as asserted by appellee in Paragraph 9 of its statement, and the matters set forth in that paragraph fall in the same category as do the statements in the paragraphs hereinbefore designated and discussed as 5, 6, 7 and 8. It will be noted that the transcript reference in

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<sup>7</sup>See O. B. pp. 3-4, giving transcript citations and illustrative excerpts from record re understanding and agreement throughout trial that all evidence by the government is offered and received against defendant ORMONT only, unless government counsel avowed or indicated that the evidence was offered against appellant, or against both defendants.



support of Paragraph 9 is the same as that given in support of Paragraphs 5, 6 and 7 above.

To obviate further laboring the point herein established, and in the interest of compelling brevity, appellant unequivocally asserts that the remainder of appellee's "statement of facts," commencing with page 8 thereof to page 16; is wholly unsupported by the record herein against appellant, with the exception of the following matters therein mentioned:

(1) "Agents of the Bureau of Internal Revenue, as stated before, conducted an investigation into the income tax returns and the income of each of the appellants (appellant) for the years 1942, 1943 and 1944" (R. B. p. 8; O. B. p. 7);

(2) An agent in the course of his investigation examined the original, and the government later introduced a photostatic copy of appellant's 1944 return (R. B. p. 9; O. B. p. 7);

(3) The government introduced in evidence a partnership return filed by Sam Ormont and appellant, which declared a net income for the fiscal period May 1, 1944 to April 30, 1945, of more than \$71,000.00 (R. B. p. 9; O. B. p. 5);

(4) The government introduced some bank records of appellant's account (R. B. p. 9; O. B. pp. 5-6);

(5) Appellant submitted various documents and statements to the agents, which included Exhibits 50 A, B and D (R. B. p. 9; O. B. pp. 12 and 14);

(6) In connection with the investigation of his income, appellant hired a certified public accountant. The accountant prepared various documents on behalf of appellant, and after appellant signed some of them, the accountant sent them to the government agents conducting the investigation. The documents contained factual data which the accountant had obtained from appellant, from books and records, and other sources of information which he furnished to him (R. B. pp. 15-16; O. B. pp. 12-14);

(7) The accountant likewise prepared and filed the "Partnership Return" which appellant and Sam Ormont both signed, reporting more than \$71,000.00. This return disclosed the division of this sum as going to "Sam Ormont—50%, \$35,694.42, and Phillip Himmelfarb—50%, \$35,694.42"; the accountant made this division upon instructions and based upon information furnished by appellant (R. B. p. 16; O. B. p. 13);

(8) Appellant Himmelfarb did not testify at the trial; he introduced character evidence, and the evidence of an accountant, to-wit, Ralph Kibbee, who, in the main, performed certain mathematical computations on behalf of Himmelfarb on the basis of the record in evidence (R. B. p. 16; O. B. pp. 15-19).

Appellant wishes at this point to direct this court's attention to the fact that the government has attached a photostatic copy of Exhibit 56 for identification to and in the appendix of its brief. Exhibit 56 for identification



was never received in evidence. It was offered in evidence, but objections interposed to its admission were sustained [Tr. pp. 1166-1167], and said proffered exhibit was excluded. Exhibit 56 for identification, therefore, is not a part of the record in this case.

Similarly, appellant takes specific exception to the designation by counsel for the government of the income declared by the Information Return filed by appellant and his co-defendant Sam Ormont, as "additional and previously unreported income," and to the implication that such income for the period May 1, 1944 to April 30, 1945 was reportable or payable for the calendar year 1944 (R. B. p. 10).

Similarly, appellant wishes to refute the erroneous assertion made in footnote 8, page 10 of appellee's brief. Contrary to the government's assertion, no agent testified in detail, or at all, as to specific facts and figures disclosed by their investigation and audits against appellant, and appellant's counsel did not cross-examine a single agent at all, let alone at great length, as is asserted in such footnote [Tr. pp. 1014; 1090; 1193].

Appellant examined one government agent, J. Bryant Eustice, on *voir dire* only [Tr. pp. 552-559; 567-584].

Appellee in that portion of its brief devoted to its argument respecting this appellant and designated Section B (R. B. p. 35), purports to briefly restate the facts therefore more fully stated by it. Such purported brief restatement of "facts" will be discussed by appellant in his consideration of that section of appellee's brief.

## POINT I.

Appellee at the outset of its discussion of the first point raised by appellant asserts (R. B. p. 35) that appellant's argument that the evidence falls far short of the minimum necessary to sustain the judgment against him, is based upon an examination of "certain bits of evidence selected by him." This assertion by appellee is made in absolute disregard of the known and obvious fact that appellant examined and evaluated every pertinent bit of evidence offered against and for him.

What has heretofore been said about the "Statement of Facts" as such, presented by appellee, applies fully to the purported restatement thereof presented as part of its argument. We deem it necessary to make only the following additional observations:

There is not a scintilla of evidence that appellant "*collected extra or over-payments in cash,*" or "computed the weight multiplied by 3¢," and the transcript references cited in support of such statements [Tr. pp. 429-431; 434-435], do not support the statement so made (R. B. p. 36). Once more counsel for the government bloated the record by the addition of the symbol "¢," to accompany the unexplained figure "3," as well as by supplying the aforementioned phrases.

Similarly, there is no evidence in the record against appellant of any discussion by him of any entries on the books and records of Acme Meat Co. with any agent of the Bureau of Internal Revenue (R. B. p. 36). The record reveals that agent J. Bryant Eustice was the only witness from whom testimony respecting entries on books and records was sought to be elicited, and that he was

not permitted, upon objection, to testify thereto [Tr. pp. 875-876; 879-883].

Again, there is not a solitary particle of evidence that appellant's bank records disclosed certain or any of his income for 1944 (R. B. p. 37), nor do appellee's transcript references support its contrary assertion [Tr. pp. 372-375; 380-387; 515; 554-555; 557-560; 568-571].

Appellee further states (R. B. pp. 37-38):

“As a result of their examination of all available books and records, other data introduced in evidence at the trial, bank records, and material, both written and oral, furnished by Himmelfarb, the agents of the Bureau of Internal Revenue found that Himmelfarb received considerable income in 1944 over and above that reported by him on his income tax return for that year.”

Appellee cites in support of such statement pages 954-955 of the transcript. Appellant again urges this court to examine the cited portions of the record. Such examination will establish that the aforequoted statement is wholly without support, and for the convenience of the court appellant has reproduced in Appendix C hereof such portion of the transcript, including for the sake of completeness, the page preceding as well as the page succeeding the two pages cited.

It will be noted from the cited portion of the record that the witness J. Bryant Eustice was asked if he had determined whether or not, on the basis of the investigation made by him, there was any additional income for the defendant Phillip Himmelfarb for the year 1944, over and above that reported on his income tax return for

that year. The answer of the witness to that question was "yes" [Tr. pp. 953-954].

The entire substance of that question and answer was that Mr. Eustice, on the basis of his investigation made a determination as to whether or not there was any additional income for appellant for the year 1944 over and above that reported by him. Such question and answer does not constitute a statement or declaration by Mr. Eustice respecting what such determination was; whether he had determined that there was such additional income or whether he had determined that there was no such additional income; nor did any other witness testify, nor was there any evidence introduced at any time establishing that there was any such additional income.

It will be observed that in the interim between the posing of the question and the reply thereto by the witness J. Bryant Eustice, an objection was made to such question, in the course of which discussion the court said:

"The objection will be over-ruled and it will call for a yes or no answer. I think your form is proper—if he determined it, whether or not in his opinion, after an investigation, he was of the opinion that there was unreported income. I think that would be an appropriate question."

Thereupon, Mr. Strong, counsel for the government, said: "I will incorporate that language into my question, if I may," which statement by Mr. Strong is immediately followed by the answer of the witness.

The answer, of course, is and can only be a reply to the question theretofore asked of the witness and then pending. The question was not and cannot be deemed to have been changed to some other nebulous, indefinite and

unknown question by the incorporation in the pending question of a statement by the court made in explanation of the reason or basis for his ruling.

It will be noted, too, from the cited portion of the transcript [Tr. pp. 954-955] that the undisclosed determination the witness Eustice did make was based upon "his investigation" and was not "*the result of their examination of all available books and records, other data introduced in evidence at the trial, bank records, and material both written and oral, furnished by Himmelfarb.*"

The word "considerable" appearing in the aforequoted paragraph from appellee's brief is another wholly gratuitous contribution to the record by the author of such brief. Although appellee in such paragraph uses the word "agents" in its plural form, no agent, excepting J. Bryant Eustice, who is wholly and completely singular, testified regarding any finding or determination respecting appellant's income for the year 1944, and he, as just pointed out, merely stated he had made a determination, but never disclosed what finding he made or what his determination was.

The government argues (R. B. p. 38) that the verdict of the jury in and of itself establishes that the jury disbelieved and rejected appellant's contentions, and found as a fact in accordance with the charge brought against appellant which the jury was privileged to do on the basis of the facts before it and permissive inferences therefrom. This would appear to be begging the very question sought to be refuted by the government in its Point I, namely, that the evidence against appellant is manifestly insufficient to support the verdict of the jury,



and such verdict and the judgment entered thereon, are contrary to both the evidence and the law.

The verdict of the jury in this case, if it demonstrates anything at all, demonstrates:

(1) That it was impossible for the jury in this case to segregate the evidence admitted against Sam Ormont only from the evidence admitted against appellant, and in its deliberations to weigh the evidence and to determine appellant's guilt solely upon the evidence admitted against him;<sup>8</sup>

(2) That the jury was misled into considering evidence not in the record against appellant by the argument of counsel for the government predicated upon evidence in the record only against appellant's co-defendant.

(3) That eradicable prejudice was aroused in the jury by the repeated references counsel for the government made in his argument to the jury respecting "extra money, side money, overcharges," of which there was no evidence in the record, as well as references to unrelated offenses and other matters dehors the record, all as pointed out in Appellant's Opening Brief (O. B. pp. 50-61).

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<sup>8</sup>Appellee (R. B. p. 4, n. 3) called the attention of this court to the fact that "appellants" at no time made any motion for separate trials upon the income tax charges. This court should further be advised that counsel for appellant herein, and who was his counsel in the trial of the case below, was substituted as such counsel approximately five days before the trial and found himself immediately confronted with the motion of the government to consolidate the trial of this case with another action then pending against appellant, and which he was compelled to resist, as well as with the necessity of preparing for the trial of this case within that extremely short period of time. Under these circumstances appellant can hardly be charged with any failure to move for a separate trial. [Tr. pp. 1360-1361.]

The constant reiteration by the government of its bald conclusions that appellant "should not now be permitted to escape the consequences of his deliberate attempt to defraud the United States," that "his guilt of the offense as to which he was convicted below, is clear," that "this court should not render any aid to so gross and wilful a violator of the law," surely cannot and will not suffice to supplant a complete lack of evidence and a gross deficiency of the record.

## POINT II.

Appellee makes no answer to appellant's second point that the trial court erred in denying appellant's motions for an acquittal of the offense charged against him in Count II of the indictment, made at the close of the government's case, and at the close of all of the evidence, other than to assert that appellant's second point is governed by its first point.

The lack of any other and further answer by appellee apparently stems from the previously admitted fact that the government has no quarrel with the law relied upon by appellant (R. B. p. 39).

## POINT III.

Appellant's Point III is that the trial court erred in admitting over appellant's objection Exhibits 35, 36A, 44, 45, 50A and 50B, and in denying appellant's motion to strike from the record Exhibits 32, 34, 35 and 36A.

Appellee in his Point III, subdivision A (R. B. p. 40), discusses Exhibits 32, 34, 35 and 36A, which comprise the bank records.



Appellant in his Opening Brief advanced a number of tenable contentions, supported by numerous, and respectable authorities that prejudicial error was committed in the admission of said exhibits in evidence over objection, and in refusing to strike same from the record upon motion therefor (O. B. pp. 42-47).

Appellee's sole and somewhat complacent answer consists of:

(a) the tacit confession that these exhibits introduced at the beginning of the trial "were to have been in part the basis of the government's agents testimony" ("connected or tied up"), and plea by way of avoidance, that "upon the objections of Himmelfarb much of the testimony offered by the government in that connection was rejected by the trial court" (that these exhibits were not "connected or tied up");

(b) the pronouncement that "if the exhibits *on their face* even in part offer support for the verdict and judgment, they are unobjectionable, and if they offer no such support, their receipt in evidence, even if erroneous, was harmless error."

Counsel, in support of this latter statement, cites five cases, simply as "the *Oliver*, *Gusick*, *Capone*, *First National Bank*, and *Gleckman* cases, *supra*" (R. B. p. 40). These citations establish that appellee cites cases with the same reckless abandon and small regard for accuracy and preciseness as it exhibited, displayed and manifested in the presentation of its "Statement of Facts."

The first case, *Oliver v. U. S.*, 54 F. (2d) 48, did not concern itself with any question of the admissibility of bank records or any other evidence. The court, in its opin-

ion (p. 50), merely recited some of the evidence to determine whether the verdict is sustained thereby and in the course of such recitation referred to some bank records in evidence.

In the second case, *Gusik v. United States*, 54 F. (2d) 618, 619, the court, in considering the contention that bank records were not admissible in evidence because they neither proved nor tended to prove gross or net income, held that such bank records are admissible if properly established. This case, it will be noted, supports appellant's position that the bank records in the instant case were inadmissible because of the complete absence of any foundation therefor and relevancy to the offense charged.

The third case cited by appellee (R. B. p. 40) is "*Capone, supra.*" The only *Capone* case previously cited by appellee is *Capone v. United States*, 56 F. (2d) 927 (R. B. p. 21). That case in no way concerns itself with or even remotely touches upon the admissibility of bank records or any other evidence. However, the case of *Gusik v. United States*, 54 F. (2d) 618, 619, cited by appellee, cites *Capone v. United States*, 51 F. (2d) 609, and appellant presumes that appellee may have intended to refer to that *Capone* case rather than to the *Capone* case, 56 F. (2d) 927, cited on page 21 of its brief.

In *Capone v. United States*, 51 F. (2d) 609, 619, the court, in considering an objection to the admission of bank records in evidence, held that such records were sufficiently established by competent proof to justify their admission in evidence. This case, too, it will be observed, supports appellant's position that the bank records in the instant case were inadmissible because of the complete absence of competent proof to justify their admission in evidence.

No volume or page citation is given for the fourth case, which is simply cited as "*First National Bank*," and that case does not appear in the list of cases in the "Table of Authorities Cited" in appellee's brief (R. B. p. iii), nor does such case appear to be cited at any other place in appellee's brief. The only case counsel for appellant found, as the result of a diligent search, entitled *First National Bank v. United States*, or vice versa, was a case reported in 36 Fed. Supp. 229. That case, however, does not in any way remotely touch upon the point in question.

The final case cited by appellee is *Gleckman v. United States*, 80 F. (2d) 394. That case, too, is contrary to the contention of appellee and substantiates the position and contention of appellant herein. It was, in fact, cited by appellant in his Opening Brief (O. B. pp. 43-49).

It will thus be seen that of the five cases cited, one, "*First National Bank*," is so inadequately cited as to constitute no citation at all; another, "*Capone*," if incorrectly cited, substantiates appellant's contention, or if correctly cited, is entirely without applicability; a third, "*Oliver*," is completely without bearing on the point in question, and the remaining two, "*Guzik*" and "*Gleckman*," likewise support the position of appellant and are contrary to that of appellee in that they require bank records, to be admissible, be shown to be relevant by competent evidence.

Appellee in his Point III, subdivision B (R. B. pp. 40-41), discusses Exhibits 44 and 45, which are, respectively, an insurance policy and five monthly reports made in connection therewith. It is appellant's contention respecting these exhibits that they were completely irrelevant to the accusation that appellant violated Section 145(b) of the Internal Revenue Code, and the only apparent reason for

their introduction in evidence was to prejudice appellant (O. B. pp. 47-48).

Appellee makes a two-fold answer to these contentions. First, that Exhibits 44 and 45 were admissible as proof of appellant's status at the Acme Meat Co. to show his true income in 1944; and secondly, that inconsistent statements concerning his status bore upon the question of wilfulness and veracity. Appellee fails, however, to indicate how the insurance policies and monthly reports could in any way show appellant's true income for the year 1944, or to explain what bearing or effect said exhibits could have upon or with respect to appellant's income at all. Moreover, appellee's present answer that said exhibits were proof of appellant's true status is entirely inconsistent with its position at the trial of the case [Tr. p. 1465].

Furthermore, as heretofore pointed out in appellant's opening brief, not the slightest relevancy existed between these exhibits and the offense charged against appellant. Being wholly foreign to and disconnected with the payment of income taxes, said exhibits may not be considered in determining whether the acts of appellant respecting his income and income taxes were or were not wilful (O. B. p. 48).

Appellee in subdivision C of Point III (R. B. p. 41) discusses Exhibits 50A and 50B. These are identical statements of net worth of appellant as of April 30, 1945, which appellant contends are wholly irrelevant to the offense of which he stood accused (O. B. pp. 48-51).

Appellee's sole answer to this contention is that these statements were sent to the government agents "in support of Himmelfarb's efforts to save himself after his attempt to defeat and evade the payment of his correct tax

had been discovered.” The quoted statement, like so much of appellee’s brief, is wholly without support in the record.

The only testimony in the record respecting the circumstances of the preparation and delivery of these statements is that Mr. William S. Malin, appellant’s accountant, sent them to government agent Bircher [Tr. pp. 1112, 1152], and that appellant had signed Exhibit 50-B [Tr. p. 1112].

This witness, with respect to another exhibit, 50-D, did testify that it was prepared at Mr. Bircher’s request [Tr. pp. 1117-1118]. However, even with the aid of the testimony respecting an exhibit other than the two in question, no such statement as is made by appellee can be yeasted therefrom.

In support of its untenable position, appellee avers that the utility of net worth statements in the determination of a taxpayer’s income is too well established to require extensive discussion, and cites *Malone v. United States*, 94 F. (2d) 281, C. C. A. 7, cert. den. 304 U. S. 562. Appellant is unable to find in the cited case any use of or reference to a net worth statement, but assuming that it does or did, we are not in the case at bar concerned with any question of the utility of a net worth statement in the determination of a taxpayer’s income because no competent evidence was introduced to lay a foundation for or to establish some relevancy between the net worth statement and the charge made against the accused.



#### POINT IV.

Appellant in his Point IV urged that counsel for the government was guilty of misconduct in addressing improper argument to the jury, and devoted over thirteen pages to a detailed presentation of that point, citing numerous cases in support of his position (O. B. p. 50).

Appellee's answer may be summed up in its following two sentences (R. B. p. 42):

“Plainly, Himmelfarb here seeks to divert attention from his own patent guilt by pointing an accusing finger elsewhere. In this he fails.”

In subdivision A of Point IV (R. B. pp. 42-43), appellee seeks to justify the repeated interchange of the plural pronoun “they” for “he,” on the basis that such “change was necessitated by the limited admissions of certain of the evidence, due principally to Himmelfarb’s own objections, as well as Ormont’s, with which the record abounds.” This explanation indicates that the government has either misconceived or deliberately ignored the point made by appellant, namely, that counsel for the government by the recurring use of the plural pronoun “they,” repeatedly referred to and applied against appellant evidence which was not in the record against him, and if in the record at all, was only there against his co-defendant, Sam Ormont.

No aid or comfort can be gained by the government from the fact that the court properly limited the admission of evidence sought to be introduced by it. The argument of counsel for the government was incurably prejudicial for each of the reasons advanced in appellant’s Opening Brief (O. B. pp. 50-63).

In subdivision B of Point IV (R. B. pp. 43-44), appellee discusses appellant's contention that counsel for the government was guilty of misconduct in stating to the jury that two persons were accessible as witnesses to appellant, were not called by him, and inferring that such witnesses, if called, would have given testimony adverse and prejudicial to appellant (O. B. pp. 59-61).

Appellee labels the argument made by appellant in support of such contention as "slick" (R. B. p. 43), and asserts that appellant's counsel in his closing argument had called attention to the limited extent to which Malin testified, and first mentioned "Moody" in such manner as to create an inference that Moody may have been responsible for the contents of appellant's return. Appellee thus seeks to justify its argument to the jury.

A reading of the transcript at the very points indicated by counsel for the government will establish that with respect to William Malin [Tr. pp. 1501-1502], a witness for the government, counsel for appellant merely evaluated the full force and effect of this witnesses' testimony in the same manner as the testimony of every other witness who testified for the government was examined and evaluated. With respect to Mr. Moody, counsel for the appellant, in discussing Exhibits 4 and 5, the 1944 tax returns for appellant and his wife, stated that there appear thereon a statement "signature of person other than taxpayer or agent preparing return," "and a signature that appears to be W. Moody on that return which establishes it as someone other than defendant Himmelfarb who prepared that return." It can hardly be said that such argument by counsel for appellant sanctions the conduct of counsel for the government in stating to the jury in argument



that certain witnesses might have been called, or weren't called, or could have been called, and to infer that they were not called because their testimony would have been adverse to appellant.

The government argues, without the citation of a single authority, that there is nothing wrong in an *argument* to the effect that certain witnesses were available to defendant, but were not called by him to the stand (R. B. p. 44). The law is to the contrary (O. B. p. 60).

### POINT V.

Appellant in his Point V (O. B. p. 65), contended that the trial court erred in refusing to charge the jury as requested by him in his proposed instructions, No. 17, 22, 25, 27, 29, 30 and 35.

In reply appellee states as a conclusion that instructions No. 17 (O. B. p. 64), No. 25 (O. B. p. 66), No. 27 (O. B. p. 67), No. 29<sup>9</sup> (O. B. p. 68), No. 30 (O. B. p. 69), and No. 35 (O. B. p. 70), were either not proper statements of the law, or did not reflect the evidence in the case, and that Instructions No. 22 (O. B. p. 65) and No. 35 (O. B. p. 70), were given in another form (R. B. p. 45).

It would have been most helpful to appellant, and undoubtedly to the court as well, if appellee had pointed out in which respects the instructions so alluded to were not proper statements of the law, or did not reflect the evidence in the case, and had indicated which of the given

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<sup>9</sup>Erroneously designated No. 28 by appellee (R. B. p. 45).

instructions covered in another form the refused instructions requested by appellant.

In the absence of such explanations and indications, there is nothing in appellee's Point V which requires answer.

### POINT VI.

Appellant in his Point VI (O. B. p. 73), urged that the trial court erred in denying appellant's motions for an acquittal notwithstanding the verdict of the jury, and in the alternative, for a new trial.

Appellee declares in response thereto that appellant's contentions are without merit, that appellant was given a fair trial, and no error was committed requiring reversal of his judgment and sentence (R. B. p. 45).

It cannot be gainsaid that the record herein completely disproves the contentions of appellee and establishes appellant's position to be tenable.

### SUMMARY.

Appellee, as if possessed of vast powers of prestidigitation, which are brought into play by the mere utterance of its conclusion that the evidence in this case presents a gross violation of the law by appellant, *ipso facto* dismisses and dispels all of the contentions advanced by appellant, all authorities cited in support of appellant's argument, and the host of errors committed in the trial of this action.

Not content, however, to rely alone upon such magical power, appellee calls to its aid the devices of distorting the facts, implication, innuendo, and embellishment of the record, in an effort to sustain its untenable position.

that certain witnesses might have been called, or weren't called, or could have been called, and to infer that they were not called because their testimony would have been adverse to appellant.

The government argues, without the citation of a single authority, that there is nothing wrong in an *argument* to the effect that certain witnesses were available to defendant, but were not called by him to the stand (R. B. p. 44). The law is to the contrary (O. B. p. 60).

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### SUMMARY.

Appellee, as if possessed of vast powers of prestidigitation, which are brought into play by the mere utterance of its conclusion that the evidence in this case presents a gross violation of the law by appellant, *ipso facto* dismisses and dispels all of the contentions advanced by appellant, all authorities cited in support of appellant's argument, and the host of errors committed in the trial of this action.

Not content, however, to rely alone upon such magical power, appellee calls to its aid the devices of distorting the facts, implication, innuendo, and embellishment of the record, in an effort to sustain its untenable position.

Counsel for appellant is constrained to disclose to this court his deep-seated belief that counsel for the government failed in their duties and responsibilities to the court, to this appellant, and to the government itself in the presentation of this case to this court, as reflected by its brief, which manifests a complete lack of regard for the seriousness of a criminal proceeding and the important significance of a brief therein.

Appellant having been neither fairly tried nor justly convicted, is entitled to a reversal by this court.

Respectfully submitted,

WILLIAM KATZ,

*Attorney for Appellant, Phillip Himmelfarb.*

Dated: July 19, 1948.







## APPENDIX "A."

Portion of Reporter's Transcript designated by appellant in his "Designation of Record on Appeal" to be included in the record and comprising all of the pertinent evidence received against and on behalf of appellant.

(a) From Reporter's Transcript of Proceedings, May 21 and May 22, 1947:

- ( 1 ) Page 2, line 1;
- ( 2 ) Page 2, lines 13 and 14;
- ( 3 ) Page 4, line 16, to p. 5, line 19, incl.;
- ( 4 ) Page 11, line 20, to p. 12, line 1, incl.;
- ( 5 ) Page 23, lines 15-23, incl.

(b) From Reporter's Transcript, Volume I, of proceedings Friday, May 23, 1947:

- ( 1 ) Page 15, lines 4-22, incl.;
- ( 2 ) Page 25, lines 13-15, incl.;
- ( 3 ) Page 25, line 18, to p. 26, line 16, incl.;
- ( 4 ) Page 32, line 5, to p. 33, line 1, incl.;
- ( 5 ) Page 41, line 24, to p. 42, line 14, incl.;
- ( 6 ) Page 49, line 9, to p. 50, line 11, incl.;
- ( 7 ) Page 52, line 8, to p. 53, line 13, incl.;
- ( 8 ) Page 53, lines 15-25, incl.;
- ( 9 ) Page 54, lines 3-25, incl.;
- (10) Page 55, line 1, to p. 56, line 1, incl.;
- (11) Page 60, line 3, to p. 62, line 9, incl.;
- (12) Page 63, line 20, to p. 64, line 5, incl.;
- (13) Page 72, line 21, to p. 74, line 21, incl.;
- (14) Page 84, lines 18-25, incl.;
- (15) Page 89, lines 9-25, incl.;

- (16) Page 92, lines 8-17, incl.;
  - (17) Page 94, lines 3-8, incl.;
  - (18) Page 94, line 14, to p. 95, line 16, incl.;
  - (19) Page 96, lines 2-12, incl.;
  - (20) Page 96, lines 15-20, incl.;
  - (21) Page 97, lines 10-24, incl.;
  - (22) Page 98, line 1, to p. 103, line 22, incl.;
- (c) From Reporter's Transcript, Volume II, of proceedings May 26, 1947:
- ( 1 ) Page 107, line 13, to p. 109, line 18, incl.;
  - ( 2 ) Page 112, lines 1-19, incl.;
  - ( 3 ) Page 151, lines 10-14, incl.;
  - ( 4 ) Page 155, lines 7-11, incl.;
  - ( 5 ) Page 156, lines 1-2, incl.;
  - ( 6 ) Page 156, lines 15-20, incl.;
  - ( 7 ) Page 156, line 24, to p. 157, line 19, incl.;
  - ( 8 ) Page 158, lines 2-3, incl.;
  - ( 9 ) Page 158, lines 19-22, incl.;
  - (10) Page 159, lines 3-25, incl.;
  - (11) Page 160, lines 15-25, incl.;
  - (12) Page 161, line 12, to p. 164, line 5, incl.;
  - (13) Page 165, lines 2-5, incl.
- (d) From Reporter's Transcript, Volume III, of proceedings of A. M. Session of May 27, 1947:
- ( 1 ) Page 182, lines 3-21, incl.;
  - ( 2 ) Page 184, line 19, to p. 185, line 10, incl.;
  - ( 3 ) Page 186, line 9, to p. 187, line 2, incl.;
- (e) From Reporter's Transcript, Volume III, of proceedings of P. M. Session of May 27, 1947:
- ( 1 ) Page 252, lines 4-10, incl.;
  - ( 2 ) Page 259, line 13, to p. 260, line 17, incl.

- (f) From Reporter's Transcript, Volume IV, of proceedings of A. M. Session of May 28, 1947:
  - ( 1 ) Page 321, line 19, to p. 322, line 9, incl.;
  - ( 2 ) Page 322, line 19, to p. 324, line 25, incl.;
  - ( 3 ) Page 373, lines 1-19, incl.
- (g) From Reporter's Transcript, Volume VII, of proceedings of P. M. Session of June 4, 1947:
  - (1) Page 763, line 22, to p. 811, line 5, incl.
- (h) From Reporter's Transcript, Volume VIII, of proceedings of P. M. Session of June 5, 1947:
  - ( 1 ) Page 892, line 5, to p. 893, line 4, incl.
- (i) From Reporter's Transcript, Volume IX, of proceedings of A. M. Session of June 6, 1947:
  - (1) Page 985, line 4, to p. 986, line 9, incl.;
  - ( 2 ) Page 986, line 23, to p. 988, line 3, incl.
- (j) From Reporter's Transcript, Volume IX, of proceedings of P. M. Session of June 6, 1947:
  - ( 1 ) Page 1008, line 25, to p. 1012, line 10, incl.;
  - ( 2 ) Page 1013, line 1, to p. 1022, line 15, incl.;
  - ( 3 ) Page 1023, line 1, to p. 1031, line 11, incl.;
  - ( 4 ) Page 1032, line 2, to p. 1039, line 7, incl.;
  - ( 5 ) Page 1040, line 6, to p. 1041, line 1, incl.;
  - ( 6 ) Page 1061, line 21, to p. 1063, line 3, incl.
- (k) From Reporter's Transcript, Volume X, of proceedings of A. M. Session of June 10, 1947:
  - ( 1 ) Page 1083, line 13, to p. 1085, line 25, incl.;
  - ( 2 ) Page 1086, lines 5-21, incl.

- (l) From Reporter's Transcript, Volume X, of proceedings of P. M. Session of June 10, 1947:
  - ( 1 ) Page 1119, lines 7-10, incl.;
  - ( 2 ) Page 1149, line 4, to p. 1150, line 23, incl.;
  - ( 3 ) Page 1151, line 17, to p. 1152, line 5, incl.;
  - ( 4 ) Page 1153, line 1, to p. 1157, line 7, incl.;
  - ( 5 ) Page 1158, line 1, to p. 1161, line 6, incl.
- (m) From Reporter's Transcript, Volume XI, of proceedings of A. M. Session of June 11, 1947:
  - ( 1 ) Page 1201, line 1, to p. 1202, line 14, incl.;
  - ( 2 ) Page 1203, line 16, to p. 1204, line 4, incl.;
  - ( 3 ) Page 1205, line 1, to p. 1214, line 6, incl.;
  - ( 4 ) Page 1215, line 1, to p. 1219, line 17, incl.;
  - ( 5 ) Page 1220, line 1, to p. 1222, line 15, incl.;
  - ( 6 ) Page 1223, line 1, to p. 1227, line 2, incl.;
  - ( 7 ) Page 1228, line 1, to p. 1238, line 6, incl.
- (n) From Reporter's Transcript, Volume XI, of proceedings of P. M. Session of June 11, 1947:
  - ( 1 ) Page 1310, line 17, to p. 1311, line 8, incl.;
  - ( 2 ) Page 1315, line 3, to p. 1317, line 6, incl.;
  - ( 3 ) Page 1318, line 1, to p. 1322, line 11, incl.;
  - ( 4 ) Page 1323, line 1, to p. 1327, line 17, incl.;
  - ( 5 ) Page 1327, lines 18 and 19, incl.;
  - ( 6 ) Page 1330, lines 6-13, incl.;
  - ( 7 ) Page 1331, lines 7-11, incl.;
  - ( 8 ) Page 1331, line 23, to p. 1332, line 4, incl.

(o) From Reporter's Transcript, Volume XII, of proceedings of A. M. Session of June 12, 1947:

- ( 1 ) Page 1400, line 1, to p. 1403, line 25, incl.;
- ( 2 ) Page 1419, line 24, to p. 1420, line 24, incl.;
- ( 3 ) Page 1421, lines 1-15, incl.;
- ( 4 ) Page 1421, lines 19-24, incl.;
- ( 5 ) Page 1422, lines 6-14, incl.

(p) From Reporter's Transcript, Volume XII, of proceedings of P. M. Session, June 12, 1947:

- ( 1 ) Page 1431, lines 9-25, incl.;
- ( 2 ) Page 1432, line 24, to p. 1433, line 20, incl.;
- ( 3 ) Page 1453, line 7, to p. 1454, line 10, incl.;
- ( 4 ) Page 1454, line 21, to p. 1455, line 12, incl.;
- ( 5 ) Page 1456, lines 2-18, incl.;
- ( 6 ) Page 1456, line 25, to p. 1457, line 14, incl.;
- ( 7 ) Page 1459, lines 10-19, incl.

(q) From Reporter's Transcript, Volume XIII, of proceedings of A. M. Session of June 13, 1947:

- ( 1 ) Page 1538, lines 12-18, incl.;
- ( 2 ) Page 1541, line 15, to p. 1542, line 10, incl.;
- ( 3 ) Page 1543, lines 10-19, incl.;
- ( 4 ) Page 1558, lines 11-24, incl.;
- ( 5 ) Page 1562, line 5, to p. 1593, line 13, incl.

(r) From Reporter's Transcript, Volume XIV, of proceedings of June 16, 1947:

- ( 1 ) Page 1599, line 4, to p. 1613, line 12, incl.

## APPENDIX "B."

Excerpts from Reporter's Transcript, Volume I, pages 427-435, inclusive:

(Testimony of Ernest Link.)

Q. You turned them over to him? A. Yes.

Q. Now, Mr. Link, did you ever see any other record of income of either Sam Ormont or Phillip Himmelfarb, or the defendant Acme Meat Company, besides the records—

The Court: The defendant Acme Meat Company?

Mr. Strong: Not the defendant; the defendant Sam Ormont, the defendant Phillip Himmelfarb and the Acme Meat Company, not a defendant.

Mr. Katz: I object to that, if the court please, on the ground that as to the defendant Himmelfarb there is no foundation laid, it assumes facts not in evidence, incompetent, irrelevant and immaterial, has no bearing on any issues in this case.

Mr. Robnett: I adopt the same objection for Mr. Ormont and add to it that it is asking for an opinion of the witness, to-wit, namely, whether it is a record of income.

The Court: Let me hear the question again.

(The question referred to was read by the reporter, as follows:

("Q. Now, Mr. Link, did you ever see any other record of [153] income of either Sam Ormont or Phillip Himmelfarb, or the Acme Meat Company, besides the records you have testified to here?")

The Court: There is no foundation for Himmelfarb. The objection as to Phillip Himmelfarb is sustained. The



objection is overruled as to the defendant Ormont. The witness may answer the question.

Do you remember it?

The Witness: Yes, I do.

No, I saw no records.

Q. (By Mr. Strong): Did you see anything? A. Yes.

Q. What? A. I saw the taking of money.

Mr. Robnett: I object to that and move to strike it out, if the court please, on the ground it is incompetent, irrelevant and immaterial, and doesn't show income.

Mr. Strong: He hasn't finished yet, your Honor.

The Court: Well, at the present stage of the answer it is a conclusion of the witness and is objectionable.

Q. (By Mr. Strong): Describe what you saw.

The Court: The answer may be stricken. The jury is instructed to disregard it. Obviously the defendant Sam [154] Ormont was in business and he had to take money from somebody.

Mr. Strong: My understanding is that the witness is testifying to money—

The Court: He just said he saw him take money. He hasn't testified to anything else.

Mr. Strong: Let me go back for a moment.

Q. Do you know the defendant Phillip Himmelfarb?  
A. Yes.

Q. Did you see Mr. Himmelfarb on the premises of the Acme Meat Company at any time? A. Yes. [155]

Q. During what period? A. During 1944 and 1945.

Q. Will you state what you observed him doing?

Mr. Katz: That is objected to upon the ground that no foundation has been laid as to time and place.

Mr. Strong: The place is the premises, and the time is 1944 and 1945.

The Court: I take it that your question generally is as to what he was doing.

Mr. Strong: I want to show how he was—

The Court: I think it is a little too broad. What did you see him doing in 1944 and 1945 is liable to cover quite a variety of situations.

Q. (By Mr. Strong): Did you see Mr. Himmelfarb performing any work on the premises of the Acme Meat Company during 1944? A. Yes.

Q. And during 1945? A. Yes.

Q. What did you observe?

Mr. Katz: I object to that, if the Court please, as too indefinite; no foundation laid.

The Court: Overruled.

A. I saw Mr. Himmelfarb making out invoices to customers when they would come to the Acme Meat Company. He would [156] then compute on the machine in the office the amount due by the customer; then he would make after that computation another computation on the machine, a multiplication of the weight of that carcass of beef, or whatever it may have been, and enter this figure which was, as a rule, a computation—

Mr. Katz: That is objected to, if the Court please. The witness quite obviously is testifying to a conclusion, and to opinions on the part of the witness, without any foundation being laid therefor.

The Court: The question is all right to where he stated just now as a rule, and he would enter the computation. From there you can go on, but not anything else about your ideas as to why he was doing it.

The Witness: I saw him compute the weight of the bill with the figure 3, and enter the amount on a list which was kept in the drawer of that desk.

Q. (By Mr. Strong): What desk? A. Of the desk of the Acme Meat Company, in the office.

Mr. Robnett: I move to strike out the answer as to Mr. Ormont upon the ground that it is hearsay and the opinion of the witness, and is not binding upon Sam Ormont.

Mr. Strong: We will tie it up, your Honor, with Sam Ormont.

Mr. Robnett: It is incompetent, irrelevant and immaterial. [157]

The Court: That was at the Acme Meat Company?

The Witness: Yes.

The Court: There is testimony in the record that the defendant Sam Ormont owned the Acme Meat Company in 1944. The objection will be overruled as to both defendants.

Q. (By Mr. Strong): Did Mr. Himmelfarb work at the Acme Meat Company?

Mr. Katz: I object to that as calling for the conclusion of the witness.

Q. (By Mr. Strong): State, if you know, what he did.

The Court: Do you withdraw the last question?

Mr. Strong: I withdraw it, to save time.

The Court: I thought you just asked him what Mr. Himmelfarb did down there, and he described it.

Mr. Strong: Then he went into some particular details. I would like to know what the defendant did.

The Court: Did you see him do anything else other than what you have just got through describing? A. Yes.

The Court: He may express his conclusion generally. Himmelfarb, was he down there in connection with the company in some way or another?

The Witness: Yes.

Q. (By Mr. Strong): In what way?

The Court: If you know. Do you know? A. He was selling beef and other meat cuts to the trade.

Q. (By Mr. Strong): For the Acme Meat Company? A. For the Acme Meat Company.

Q. As an employee?

The Court: Do you know whether or not he was an employee or one of the owners, or how he was connected? Do you know that? A. What is that?

Q. Whether or not he was an employee or otherwise connected with the company? The answer to that is yes or no? Do you know it? A. I can say yes and no, because I know two sides of it.

Q. You know two sides? A. Yes.

Q. What I am trying to get at is, when I asked you if you know, if you know it of your own knowledge, or if you just heard someone gossiping or not? A. No, it is definitely knowledge.

Q. You know that? A. Yes. [159]

Q. What was his relationship to the Acme Meat Company? A. He was a partner.

Q. He was a partner when? A. In 1944 and 1945.

Q. And 1945? A. Yes.

Mr. Robnett: I move to strike out the answer as a conclusion of the witness, if the Court please.

Mr. Strong. We have further proof.

The Court: That is a legal conclusion, whether a person is a partner, or is not. I think probably your objection is good as to both defendants, and the jury will be instructed to disregard the answer of the witness. I think perhaps more foundation can be laid.

The Court: Did you make out the payroll checks? A. No.

Q. Did you audit the payroll checks? A. Yes.

Q. You checked them in the book? A. Yes.

Q. Against the check books? A. Yes.

Q. Were they payroll checks to Phillip Himmelfarb? A. Yes. That's why the answer was yes and no.

Mr. Strong: If your Honor please, I started this to get Mr. Himmelfarb into the picture, but I have forgotten what I was getting him into. The question I asked was sustained as to Mr. Himmelfarb, because he was not in the picture. May I have the question read?

(Record read by the reporter.)

The Court: You had better ask another question. What you are trying to find out is the connection of Himmelfarb with the Acme Meat Company?

Mr. Strong: For a purpose. We will leave that for the time being.

Q. These entries which you discussed, which you saw Mr. Himmelfarb making on the sheets of paper, was it—

A. It was a list, yes.

Q. Did you ever see Mr. Himmelfarb receive any sums of money in connection with the sale of meat, which he entered on those sheets you have described?

Mr. Katz: I object to that, as a conclusion of the witness; incompetent, irrelevant and immaterial; no foundation laid.

Mr. Robnett: It is incompetent, irrelevant and immaterial as to Mr. Ormont. There is no connection between Mr. Ormont and Mr. Himmelfarb shown here except as an employee.

Mr. Strong: I don't know that it is shown except as an employee. [161]

Mr. Robnett: It is shown he received employee's checks.

The Court: That is the record up to now.

Mr. Strong: It shows the receipt of those checks by him.

The Court: Payroll checks. Let me hear that.

(Record read by the reporter.)

The Court: The objection is overruled as to both defendants.

A. Not in connection with that list.

Q. (By Mr. Strong): What did you observe in connection with that list? A. I saw on the list the names of customers and the amounts placed opposite those names of the customers. Sometimes they were written in the handwriting of Mr. Himmelfarb, and sometimes in the handwriting of Mr. Ormont. Some of them were marked "Paid" and crossed out; some of them were left open, and not crossed out.

Q. Did you record any of those amounts on those sheets into the records and books of the Acme Meat Company?

Mr. Katz: Objected to as to the defendant Himmelfarb. It is incompetent, irrelevant and immaterial. The books and records are the best evidence.

Mr. Strong: We don't have them.

Mr. Robnett: We join in the objection.



The Court: Objection overruled.

Q. Did you record any of the amounts from that list you [162] have spoken of into the books and records which you kept of the Acme Meat Company? A. No.

Q. (By Mr. Strong): With reference to Mr. Himselfarb—

The Court: Did you ever examine that list? A. That one time.

Q. One time? A. Yes.

Q. You say there were names of people on the list? A. Yes.

Q. And figures? A. Yes. I had half an hour's time to study it.

## APPENDIX "C."

Excerpt from Reporter's Transcript, Volume III, pp. 953-956, inclusive:

(Testimony of J. Bryant Eustice.)

Q. Is that the only page? A. Just the one page.

The Clerk: We have a 40-A, your Honor.

The Court: 40-B. You said Mr. Berlin was there. The [816] bookkeeper's name is Link, isn't it?

The Witness: The first bookkeeper's name was Link, and Mr. Berlin was bookkeeper at the time I made the audit.

Q. (By Mr. Strong): Looking at Government's Exhibit 40-B for identification, will you state whether that is the transcript which you made of the books and records of the Acme Meat Company, as you just testified? A. Yes, sir, it is.

Q. Do you have the books and records at the present time? A. No, sir.

Q. Where did you last see them? A. At the office of the Acme Meat Company.

Q. Will you take the income tax return of the defendant, Phillip Himmelfarb, for the year 1944? A. What number is that, please?

The Court: 4. A. I haven't got it.

Q. You have it now? A. Yes, sir.

Q. You have already testified as to what books and records you used in connection with your examination of the return for the year 1944, of Himmelfarb, is that right? A. Yes, sir, I have.

Q. Now, on the basis of the investigation which you made, [817] as you have heretofore testified, did you determine whether or not there was any additional income

for the defendant Phillip Himmelfarb for the year 1944, over and above that reported on the income tax return of Phillip Himmelfarb for the year 1944?

Mr. Katz: Objected to, if the Court please. No foundation has been laid; it is incompetent, irrelevant and immaterial, and has no bearing upon any issue in the case. It calls for the conclusion of the witness; calls for hearsay; assumes facts not in evidence. With respect, if the Court please to the matter of that transcript, we object to the use of it as being a hearsay record of a hearsay record.

The Court: Let me hear the question again, will you, Mr. Reporter?

(Question read by the reporter.)

The Court: That calls for his conclusion. This witness is offered as an expert.

Mr. Strong: May I submit that these are questions which were asked as to the other defendant?

The Court: He did not object.

Mr. Strong: This is just preliminary.

The Court: The objection will be overruled, and it will call for a yes or no answer. I think your form is proper—if he determined it, whether or not in his opinion, after an investigation, he was of the opinion that there was unreported income. I think that would be an appropriate question. [818]

Mr. Strong: I will incorporate that language into my question, if I may.

The Witness: The answer is yes.

Q. Will you take up the summary of adjustments which you have there, and turn to the page with reference to Phillip Himmelfarb for the year 1944? A. Yes, sir.

Q. And the income tax return for Phillip Himmelfarb for the year 1944?

Mr. Katz: If the Court please, with reference to that summary, I believe that is a matter that was gone into before. It was based upon the working papers that had been excluded, insofar as used in 1941 [*sic.* Ex. 41], which was established to be inaccurate, was prepared by others, and is not verified, and is based upon oral statements from persons that are not before this court, and based in part upon documents, and papers that have not been brought into this court. I believe that the summary is subject to the same infirmities as the working papers, and I object to it upon those grounds.

Mr. Strong: The witness testified that he did not use 1941 [*sic.* Ex. 41].

The Court: That he did not use the working papers?

Mr. Strong: That's right.

The Court: He has testified he did not use the working papers in making his calculations in relation to Phillip [819] Himmelfarb for 1944 income.

Mr. Katz: The preceding question, if the Court please, was upon the basis of the investigation he made he came to a determination with respect to the income tax. The investigation consisted of the information contained in his working papers, which this Court previously distinguished. He said he did not necessarily rely upon, but did use it.

Mr. Strong: That is anticipating what the basis is. We will show what the basis is, as we go along. The witness has already testified that in making up his opinion as to what the additional income is he relied upon the income tax return for the year 1944, his bank records, which are here, and upon other documents and the books and

records of the Acme Meat Company, and he specifically pointed out he did not rely upon 1941 [*sic.* Ex. 41].

The Court: And whatever information was contained therein. However, he did get that information, and gave consideration to it in his investigation.

Mr. Strong: And rejected it.

The Court: He said that he rejected it; but he gathered the information. He has the information there concerning the man's bank account. He used that to verify certain items, didn't you—the information you had on your working papers?

The Witness: No, not to verify any items, which I made adjustments on. [820]

The Court: He says any items he made adjustments on. He had to verify the source of income, so he had to take that into consideration.

Mr. Strong: This is the same problem we had at the outset of the trial.

The Court: And we are just about in the same place to.

Mr. Strong: Do you mean as to a recess?

